

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
JAMES A. KAY, JR.)	WT Docket No. 94-147
)	
Licensee of One Hundred Fifty Two)	
Part 90 Licenses in the)	
Los Angeles, California Area)	
)	
MARC SOBEL)	WT Docket No. 97-56
)	
Applicant for Certain Part 90 Authorizations)	
in the Los Angeles Area and Requestor of)	
Certain Finder's Preferences)	
)	
MARC SOBEL AND MARC SOBEL)	
D/B/A AIR WAVE COMMUNICATIONS)	
)	
Licensee of Certain Part 90 Stations in the)	
Los Angeles Area)	

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 2010

Released: April 12, 2010

By the Commission:

1. James A. Kay, Jr. (Kay) and Marc D. Sobel (Sobel) (collectively Petitioners) ask the Commission to reconsider decisions revoking Petitioners' 800 MHz radio licenses by rescinding the revocations and substituting an alternative set of sanctions proposed by Petitioners. Because Petitioners have failed to show good cause for the Commission to disturb a decision that has become final and to reopen this proceeding, in which the court of appeals has affirmed the Commission's orders and issued its mandate, we deny their request.

I. BACKGROUND

2. In companion decisions released on January 25, 2002, the Commission found that Kay and Sobel had participated in the unlawful transfer of control of certain 800 MHz stations licensed to Sobel and lacked candor in their submissions to the Commission. The

Commission therefore determined that it would be appropriate to revoke their licenses in the 800 MHz service.¹

3. The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decisions on February 1, 2005 and denied rehearing on April 5, 2005.² The United States Supreme Court then denied certiorari on October 3, 2005.³ On December 5, 2005, the D.C. Circuit denied a motion for further stay of the mandate and issued its mandate.⁴

4. On August 3, 2005, Petitioners filed a Motion to Modify Sanction in which they asked the Commission to "rescind the license revocations, substituting for them a modified sanction package"⁵ Pursuant to their proposed "modified sanction package," Petitioners would contribute a block of spectrum in the 470-512 MHz band for public safety use and would also make payments to the Treasury totaling \$750,000. Petitioners contend that the proposed "modified sanction package" would better serve the public interest than the revocation of their 800 MHz licenses. Petitioners also filed various motions for stay and for an extension of operating authority while their Motion to Modify Sanction was being considered.⁶

II. DISCUSSION

5. The propriety of taking further action in this proceeding is circumscribed by considerations of administrative and judicial finality. The orders revoking Petitioners' 800 MHz licenses are final orders of the Commission. The time for reconsideration of these orders has long passed;⁷ judicial review has been completed; and the mandate of the appellate court has issued.

¹ See *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002), *recon. granted in part and denied in part*, 17 FCC Rcd 8554 (2002); *Marc Sobel*, 17 FCC Rcd 1872 (2002), *recon. denied*, 17 FCC Rcd 8562 (2002), *further recon. denied*, 19 FCC Rcd 801 (2004). Additionally, the Commission denied Petitioners' applications for other 800 MHz licenses and their finder's preference requests in the 800 MHz service. In each of the decisions, the Commission provided: "the licensee IS AUTHORIZED to continue operation of the stations until . . . final disposition of all administrative and/or judicial appeals." 17 FCC Rcd at 1866 ¶ 109 and 1895 ¶ 90.

² *Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005).

³ *Kay v. FCC*, 126 S.Ct. 176 (2005).

⁴ *Kay v. FCC*, No. 02-1175 (D.C. Cir. Dec. 5, 2005) (order).

⁵ Motion at 2. Petitioners added further details to their proposal in filings on September 14, 2005 and October 24, 2005.

⁶ These are: Motion for Stay Pending Action on Motion to Modify, filed August 23, 2005, and a Motion for Extension of Operating Authority, filed October 17, 2005, and Motions for Further Extension of Operating Authority, filed January 17, 2006; April 12, 2006; July 19, 2006; October 12, 2006; January 9, 2007; April 11, 2007; July 10, 2007; October 9, 2007; January 18, 2008; April 17, 2008; July 11, 2008; September 15, 2008; December 11, 2008; March 12, 2009; June 8, 2009; September 15, 2009; December 9, 2009; and March 1, 2010.

⁷ See 47 C.F.R. § 1.106(f).

In accordance with that mandate, we hereby uphold the revocation of Petitioners' 800 MHz licenses.⁸

6. In this case, Petitioners have not shown good cause for us to request that the D.C. Circuit recall its mandate. The D.C. Circuit has stated:

A mandate once issued will not be recalled except by order of the court for good cause shown. The good cause requisite for recall of mandate is the showing of need to avoid injustice.⁹

While Petitioners contend that adoption of their “modified sanction package” would serve the public interest, they fail to demonstrate factors sufficiently extraordinary to upset the principles of administrative and judicial finality and for the Commission to seek recall of the court’s mandate. In particular, they have not demonstrated that implementing the sanctions specified in the Commission’s existing decisions, which have been upheld by the courts on their merits, would constitute an injustice. Indeed, Petitioners do not even attempt to show that modifying the sanctions imposed by the Commission is necessary to avoid injustice. We also note that their modified sanctions package does not yield such extraordinary public interest benefits as to justify upsetting considerations of administrative finality.

7. In the absence of good cause to revisit the existing decisions, we will deny Petitioners’ motion and give effect to the court’s mandate. Since the final disposition of all administrative and judicial appeals of our 2002 decisions has now occurred, consistent with the terms of those decisions, Petitioners must stop operation of the stations for which its licenses were revoked.

III. ORDERING CLAUSES

8. ACCORDINGLY, IT IS ORDERED, that the Motion to Modify Sanction, filed August 3, 2005, IS DENIED.

9. IT IS FURTHER ORDERED, that the Motion for Extension of Operating Authority, filed October 17, 2005, the Motions for Further Extension of Operating Authority, filed January 17, 2006, April 12, 2006, July 19, 2006, October 12, 2006, January 9, 2007, April 11, 2007, July 10, 2007, October 9, 2007, January 18, 2008, April 17, 2008, July 11, 2008, September 15, 2008, December 11, 2008, March 12, 2009, June 8, 2009, September 15, 2009, December 9, 2009, and March 1, 2010, by James A. Kay, Jr. and Marc D. Sobel, ARE GRANTED in part and MODIFIED in part and that the licensees ARE AUTHORIZED to

⁸ See *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 281-82 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

⁹ See *Greater Boston*, 463 F.2d at 277, *quoting Hines v. Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958) [internal quotation marks omitted].

continue operation of the stations as specified in the previous orders of the Commission until 12:01 A.M. on the 11th day after release of this memorandum opinion and order.¹⁰

10. IT IS FURTHER ORDERED, that the Motion for Stay Pending Action on Motion to Modify, filed August 23, 2005, by James A. Kay, Jr. and Marc D. Sobel, IS DISMISSED as moot.

11. IT IS FURTHER ORDERED, that copies of this order SHALL BE SERVED on James A. Kay, Jr., Marc D. Sobel, and the Enforcement Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁰ Petitioners sought extensions until June 10, 2010. We modify the requested time period to better comport with our disposition herein.